

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMPUWARE CORPORATION,

Plaintiff,

Civil No. 03-70247
Hon. John Feikens

v.

MOODY'S INVESTORS SERVICES,
INC.,

Defendant.

_____ /

OPINION AND ORDER

Previously, I have ruled that Defendant Moody's could assert reporter's privilege, as defined by New York law, over some of the materials sought by Plaintiff in discovery. Compuware Corp. v. Moody's Investor's Services, 222 F.R.D. 124, 127 (E.D. Mich. 2004). In order to complete my decision on Plaintiff's Motion to Compel Discovery, I required Moody's to submit, for *in camera* review, a list of all documents it claims are protected by reporter's privilege. Having reviewed the submission, I now find all such documents are privileged, and therefore DENY the remainder of Plaintiff's Motion to Compel.

FACTUAL BACKGROUND

Moody's asserts no privilege for the following categories of documents:

- Contractual agreements between Moody's and IBM;
- Moody's invoices to IBM;

- Documents sufficient to identify the members of rating committees that considered IBM ratings for the five-year period prior to September 9, 2003;
- Research files, notes, or memos written by Moody's employees regarding the rating of Compuware; and
- Documents that discuss the competition between Compuware and Computer Associates during the time period assessed by the rating in dispute.

I also note that Defendant states there are no later-created IBM-related documents that refer to the August 2002 rating of Compuware, so there are no privilege determinations to be made.

Defendant claims privilege for Schedule A, which contains 17 documents that were either stamped "IBM Confidential" or "For Internal IBM Use Only." Additionally, Defendant claims privilege for Schedules B and C1, which are 38 documents that contain information that Defendant Moody's says IBM supplied to Defendant with an implied condition of confidentiality. In support, Defendant cites its Rating Methodology Handbook, which states that "Moody's uses confidential information provided to it by issuers only in ratings and will not otherwise use or disclose confidential information." (Exh. E. at 20.)

Finally, Moody's claims privilege for Schedule C2, which is comprised of 21 documents that Defendant says contain or reflect its analytic and editorial pre-publication process. Defendant states that none of these 21 documents makes a direct reference to Compuware or IBM's litigation with Compuware. In response to this

Court's requirement that Defendant state other sources for the materials for which privilege is claimed, Moody's states that all non-confidential information¹ is available from other sources, including Moody's published ratings, IBM's public filings, and IBM's press releases. Therefore, the only information contained in documents on Schedule C2 that is not available elsewhere is Moody's own pre-publication analysis of this publicly-available information.

ANALYSIS

The New York Reporter's Privilege Statute creates an absolute privilege against any requirement to disclose any "news obtained or received in confidence." New York Civil Rights Law §79-h(b). When the material requested is nonconfidential, the privilege is qualified, and can be overcome if the party seeking the disclosure can make "a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." New York Civil Rights Law §79-h(c).

The documents stamped "Confidential" or "Internal IBM Use Only" were clearly supplied to Defendant under an express agreement of confidentiality, and therefore, are absolutely protected from disclosure. Therefore, Plaintiff's Motion to Compel these 17 documents (those documents on Schedule A) is DENIED.

¹Defendant states these documents do not contain information received under either an implied or express condition of confidentiality.

I now turn to the 38 documents (Schedules B and C1) Moody's argues contain information supplied under an explicit or implied condition of confidentiality and therefore should receive the same protection as those documents in Schedule A. Schedule B contains those documents that were supplied by IBM, and Schedule C1 contains internally prepared documents that incorporate information supplied under an implied condition of confidentiality. Defendant argues that IBM gave non-public financial information to Moody's under an implied or implicit condition of confidentiality even if the documents were not expressly marked as such. In support, Moody's cites Plaintiff's Amended Complaint, stating that Defendant bases its ratings in part on "confidential, non-public information provided to Moody's by the issuers." Given the widespread recognition of Moody's use of confidential information, the reliance in that confidentiality that an issuer would have after reading the handbook, and the nature of the documents on Schedules B and C1,² I believe these documents or the information that they contain were provided with an implied condition of confidentiality, and thus, are absolutely privileged. Therefore, Plaintiff's Motion to Compel is DENIED for the 38 documents comprising Schedules B and C1).

Finally, I turn to those documents for which Moody's claims a privilege solely on the grounds that these documents contain or reflect unpublished news in the form of Moody's internal editorial and analytical materials (Schedule C2). In order to decide this claim, I must decide whether having Moody's analysts' pre-publication

²For example, documents on Schedule B discuss topics including IBM's pricing strategy for particular products and IBM's royalty income. Similarly, Schedule C1 contains documents discussing topics including IBM's marketing strategy, IBM's long-term business plans, internal reorganizations, and loan strategies.

assessments of publicly-available information (i) is highly material and relevant and (ii) is critical or necessary to the maintenance of Compuware's claim or proof of an issue material thereto, since all other information in those documents is available from other sources and therefore is privileged. New York Civil Rights Law §79-h(c).

For reasons stated in my previous opinion, Compuware's defamation claim has the following elements that must be proven: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) the alleged defamatory statements were made with actual malice, which is defined as either making the statement with knowledge of its falsity or in reckless disregard of the truth, and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication. Compuware Corp. v. Moody's Investor's Services, 222 F.R.D. 124, 127 (E.D. Mich. 2004). The only element that Moody's internal thinking might help to demonstrate is the third element. The same element is also the only implicated element in the breach of contract claim, but I note that evidence of improper influence over Compuware's rating due to the importance of its relationship with IBM would be relevant. Id. at 127-8.

None of the documents at issue here mention Plaintiff, the rating in dispute, or the lawsuit between Plaintiff and IBM. Therefore, the thoughts of the Moody's analysts expressed here could not be classified as "highly material and relevant" because such thoughts would not be relevant to the claims at issue here. The documents for which Moody's claims privilege on Schedule C2 cannot speak to recklessness in the decision

process behind the disputed rating, and also cannot show improper influence, since the documents never refer to Compuware, the lawsuit, or the rating at issue in this case. Since the material for which privilege is asserted is not relevant to the claim, Plaintiff's Motion to Compel those documents containing Moody's pre-publication materials must be DENIED.

CONCLUSION

Because I find Defendant's claim of privilege for the documents at issue here is valid, Plaintiff's Motion to Compel regarding these documents is DENIED.

IT IS SO ORDERED.

John Feikens
United States District Judge

Date: _____